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No. [redacted] 415

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. [redacted] 1925

TERRENCE DRUGGAN,
Appellant-Petitioner,
vs.
PALMER E. ANDERSON, U. S. Marshal for the Northern District of Illinois, and WESLEY H. WESTBROOK, Jail Superintendent of the County Jail, Cook County, Illinois,
Appellees-Respondents.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable
J. H. Wilkerson,
District Judge
Presiding.

Motion to Admit Appellant-Petitioner to Bail Pending Appeal, or in the Alternative to Advance Cause for Hearing and Suggestions in Support Thereof.

THOMAS D. NASH,
MICHAEL J. AHERN,
Counsel for Appellant-Petitioner.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1924.

No. 1151.

TERRENCE DRUGGAN, Appellant-Petitioner, vs. PALMER E. ANDERSON, U. S. Marshal for the Northern District of Illinois, and WESLEY H. WESTBROOK, Jail Superintendent of the County Jail, Cook County, Illinois, Appellees-Respondents.	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division. Honorable J. H. Wilkerson, District Judge Presiding.

MOTION TO ADMIT APPELLANT-PETITIONER TO BAIL PENDING APPEAL, OR IN THE ALTERNATIVE TO ADVANCE CAUSE FOR HEARING.

MOTION.

Comes now Terrence Druggan, appellant-petitioner, by Thomas D. Nash and Michael J. Ahern, his counsel, and moves the court for admission to bail pending his appeal.

In the event said motion is at this time denied, appellant-petitioner in the alternative, moves the court to advance said cause for hearing and shows to the court that said cause is here pending on appeal allowed to this court by the District Court of the United States for the

Northern District of Illinois, Eastern Division, from an order and judgment of said court dismissing the petition for a writ of habeas corpus filed in the District Court by said appellant-petitioner; that said petition for a writ of habeas corpus was filed to review the judgment of said District Court, sentencing appellant-petitioner to one year in the House of Correction for contempt of court; that appellant-petitioner has served six months of said sentence and unless bail is granted, or said cause is advanced for hearing, appellant-petitioner will have served the remainder of said sentence before said cause is reached in its regular order. Appellant-petitioner further shows to the court that the matter involved is one of general public interest and that the only question in issue on said appeal is the question of the jurisdiction of said District Court, and that it is provided by Rule 32 of this court that cases which involve only the question of the jurisdiction of the court below will be advanced on motion.

Thomas A. Nash

Michael J. Ahern

Counsel for said Appellant-Petitioner.

SUGGESTIONS OF THE APPELLANT-PETITIONER IN SUPPORT OF HIS MOTION FOR BAIL.

STATEMENT OF FACTS.

The appellant, Terrence Druggan, hereinafter called the petitioner, moves for admission to bail pending the determination of the appeal of your petitioner, allowed to this court by the District Court of the United States for the Northern District of Illinois, Eastern Division, from the order and judgment of that court dismissing his petition for a writ of habeas corpus. Petitioner was sentenced to imprisonment for one year and fined one thousand ($1,000) dollars in a prosecution for contempt of court under Section 24*, of Title II of the National Prohibition Act. The material portions of the injunctional order upon which the contempt proceeding was founded recite (Rec., ...):

> "And now, on this 7th day of February, A. D. 1924, this cause coming on to be heard upon the bill of complaint heretofore filed in this court, and upon the affidavits of Edwin A. Olson, Brice F. Armstrong, and John W. Fonner, duly filed in open court, and it appearing to the satisfaction of the court by inspection of the bill and said affidavits and otherwise, that a nuisance under the National Prohibition

*Sec. 24. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

Act exists as described in said bill, on the premises hereinafter described, it is

Ordered, that pending the final hearing and determination, and until the conclusion of the trial of said bill of injunction against said nuisance, no liquor shall be manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of, in or upon the premises, or any part thereof, located in the City of Chicago at West Roosevelt Road and South Campbell avenue, County of Cook, State of Illinois, * * *; and that all of the defendants, the Standard Beverage Corporation, B. J. Bowman, * * * Terrence Druggan * * * be restrained and enjoined from keeping, using, maintaining, dealcoholizing, or otherwise permitting and aiding, abetting, or assisting the keeping, using, or maintaining of said premises as a place where intoxicating liquor is manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of in violation of Title II of said National Prohibition Act, and that said defendants, and the others above mentioned, be commanded not to overlook, neglect or fail to prevent such use or maintenance of said premises."

The information for contempt contains by way of recital the enjoining portion of the injunctional order above quoted. It then charges the defendants, therein mentioned, with having removed from the premises of the Standard Beverage Company on three separate occasions a large number of barrels of beer; after specifying these three overt *acts of removal,* it goes on to recite that the defendants "Did then and there manufacture, sell, keep, barter, dealcoholize *and otherwise dispose of** said beverage." (Rec., ...)

The judgment order of the court recited no findings of fact, but found the defendants, therein mentioned, "guilty of contempt of court of violating the temporary injunction, *as charged in said injunction.*" (Rec., ...)

As grounds for the admission of petitioner to bail, the following suggestions are respectfully submitted:

*Italics throughout are ours.

SUGGESTIONS ON THE MOTION FOR ADMISSION TO BAIL.

Point I.

A.

Title II of the National Prohibition Act, is unconstitutional and void. Sections 1, 27, 37 and 38 may be constitutional if they have reference only to Title I of the Act and trace their source of authority to the war time powers of Congress.

Leaving out of consideration of this brief, Sections 1, 27, 37 and 38 of Title II aforesaid, for they in nowise affect the rights of the petitioner herein, the contention of the petitioner that Title II of the National Prohibition Act is unconstitutional and void, may be reduced to the following syllogistic form:

A. The Eighteenth Amendment to the Constitution of the United States went into effect and became operative as a part of the Constitution of the United States on January 16, A. D. 1920.

Dillon v. *Glos*, 256 U. S. 368, 65 Law Ed. 994.

B. The Government of the United States is a Government of limited and defined powers. All national authority is derived from the Constitution of the United States, in which the powers of the Federal Government are enumerated.

12 C. J. p. 742, Sec. 156, and U. S. Sup. Ct. cases there cited.

Conclusion—Title II of the National Prohibition Act, having been passed October 27, 1919, prior to the time

when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void.

The point here involved is not that a Legislative body may not pass a law *in praesenti* to become effective *in futuro.* The law is well settled that a Legislative body having power to legislate over a particular subject-matter may pass laws to become operative at a future date or on the happening of a future event; neither are anticipatory State statutes forbidden, unless there is, by the terms of the Constitution, a limitation on the Legislature to pass them. The objection here made, is, not that Congress passed the Volstead Act to go into effect *in futuro,* but that it passed it at all, at the time when it did pass it; that it had no power whatever, under the Federal Constitution, to pass any legislation with respect to the Eighteenth Amendment, until that amendment became effective and operative, as a part of the Constitution of the United States.

It is not here contended that the Eighteenth Amendment is unconstitutional; neither is it contended that Congress did not derive the power, impliedly, from Section I of the Eighteenth Amendment and, expressly, from Section II of the Eighteenth Amendment to enact legislation to make the amendment effective. It is conceded that Congress derived such power from the Eighteenth Amendment, but it is contended that at the time the National Prohibition Act was passed, such power was merely inchoate and *not vested* until January 16, 1920.

In *Dillon* v. *Glos,* 256 U. S. 368, 65 L. Ed. 994, the court said:

> "The provisions of the Act, which the petitioner was charged with violating, and under which he was arrested (Title II, Secs. 3, 26), were by the terms of

> the Act (Title III, Sec. 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter *by its own terms* was to *go into effect* one year *after* being ratified. *Its ratification,* of which we take judicial notice, was consummated January 16, 1919." (Italics ours.)

That Congress regarded the Eighteenth Amendment as inoperative and ineffective until one year after its ratification, is clear from the language of Section 3 of Title II of the National Prohibition Act, which reads:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States *goes into effect,* etc., etc."

Likewise is it clear, from the language of Section 21 of Title III of the National Prohibition Act, which reads:

> "Titles I and III and Section 1, 27, 37 and 38 of Title II of this Act shall take effect and be in force from and after the passage and approval of the Act. The other sections of Title II shall take effect and be in force *from and after the date when* the Eighteenth Amendment to the Constitution of the United States *goes into effect.*"

That the Eighteenth Amendment did not become effective at the time of its ratification seems to be recognized also in the National Prohibition cases, 253 U. S. 350, when the court, in the 10th conclusion of its opinion, in referring to the power confided to Congress by Section II of the Eighteenth Amendment, said:

> "That power may be exerted against the disposal for beverage purposes of liquors manufactured *before the amendment became effective,* just as it may against subsequent manufacture for those purposes."

Likewise, in *Street* v. *Lincoln Safe Deposit Company,* 254 U. S. 88, the court said that the Eighteenth Amendment did not indicate

> "any purpose to confiscate liquors lawfully owned

> at the time the amendment *should become effective* and which the owner intended to use in a lawful manner."

Title II of the National Prohibition Act is, what is known as contingent legislation. The general rule with regard to contingent legislation is that a Legislature, whether state or national, *having the power* to pass a law *in praesenti* may make it effective *in futuro;* and with regard to many things what it may do immediately it may also do mediately; as was said in the *People* v. *Reynolds,* 10 Ill. (5 Gil.), p. 1, at p. 10:

> "Necessarily, regarding many things especially affecting local or individual interests, the Legislature may act either mediately or immediately."

See also *Ex parte* Wall, 48 Cal. 279 (315). The converse of this proposition ought also to be true, viz.: what a legislative body cannot do immediately it cannot do mediately; or, if a legislative body cannot pass an Act to become effective in the present, it cannot, in the present, pass an Act to become effective in the future, except that in most of the states, the several constitutions specifically provide for legislation, except in emergency cases, to become effective at a date subsequent to passage. A state legislature, when not otherwise limited by the state constitution, has a present plenary power to legislate, and may therefore pass an Act to become effective immediately or in the future, as it sees fit. Congress also, acting **under powers already granted** by the Constitution, may pass laws to become effective immediately or in the future, as it sees fit; but where Congress has not the power to pass an act **effective immediately,** it should not be held to have authority to pass an Act, effective in the future, when it would receive such authority.

Certain it is that Congress has no power to make

Title II effective immediately. The inhibitions of the National Prohibition Act which became effective immediately on the passage and approval of that Act, were "permissible *only because* in the opinion of Congress the war emergency demands it." *Ruppert* v. *Caffey*, 251 U. S. 264 (301). Not having the authority to pass Title II to become effective immediately, Congress had no power to pass Title II at all on October 27, 1919, for it could not anticipate the grant of power conferred by an Amendment which was not to go into effect until January 16, 1920. What it could not do immediately, it could not do mediately; what it could not do presently, it could not do prospectively. If it had power to pass an Act effective in the future, it had power to pass such Act effective in the present. If the latter power be denied, so also must the former be denied.

The decision in *Dillon* v. *Glos*, 256 U. S. 368, 65 L. Ed. 994, to the effect that the Eighteenth Amendment went into effect one year after its ratification, is supported by a number of decisions construing statutory enactments, and, we see no reason why the same rules of construction as are applied to a statute, should not be applied to a constitution or a constitutional amendment. A valid statute is just as much the law as is a valid constitutional amendment. Applying then the rule, as applied to statutes, it can safely be said that the constitutional amendment did not become the law of the land upon its ratification January 16, 1919, but became the law of the land only when it went into force and effect on January 16, 1920. That the Eighteenth Amendment did not become the law of the land until January 16, 1920, and that until then it granted no power, conferred no authority and imposed no obligation or duty, will more fully appear from the cases hereafter cited and quoted from.

"A statute has not, *ex proprio vigore*, any force until it becomes the law of the land, and that is when, by its terms, it takes effect."

Neisel v. *Moran*, 85 So. 346 (359).

Gilbert v. *Ackerman*, 53 N. E. (N. Y.) 753.

In re Howe, 19 N. E. (N. Y.) 513.

36 Cyc. 1192, Notes 6, 7.

City of Davenport v. *R. R. Co.*, 37 Ia. 624.

Jackman v. *Garland*, 64 Me. 133.

"A statute passed to take effect at a future day, is to be understood as speaking from the time it goes into operation, and not from the time of its passage."

Price v. *Hopkins*, 13 Mich. 318.

Rice v. *Ruddiman*, 10 Mich. 125.

"No statute has, *ex proprio vigore*, any force until it becomes the law of the land."

Cargill v. *Power*, 1 Mich. 369, 370.

Charless v. *Lamberson*, 1 Ia. 435, (443).

State v. *Bentley*, 101 Pac. (Kan.) 1073.

Shook v. *Laufer*, 100 S. W. (Tex. Civ. App.) 1042.

State v. *Williams*, 90 N. E. (Ind.) 754.

Mills v. *State Board*, 98 N. W. (Mich.) 19.

"Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the Legislature and approved by the executive has no force whatever for any purpose."

36 Cyc. 1192, Notes 6, 7.

State v. *R. R. Co.*, 93 Pac. (Mont.) 945, 15 L. R. A. (N. S.) 134; text 138.

See also:

In re Alexander, 44 So. (Fla.) 175.

Thompson v. *State*, 47 So. (Fla.) 816.

Neisel v. *Moran*, *supra*.

Schneider v. *Hussey*, 1 Pac. (Idaho) 343.
Harding v. *People*, 15 Pac. (Colo.) 727.
Churchill v. *Bemis*, 64 N. W. (Neb.) 348.
Rogers v. *Voss*, 6 Ia. 405.
Scales v. *Marshall*, 70 S. W. (Tex.) 945.
State v. *Mounts*, 14 S. E. (W. Va.) 407.

In *State* v. *Dircks*, 111 S. W. (Mo.) 1, the court said:

> "While the amendment *became a part* of the Constitution of this State from the time of the canvass of the vote thereon by the Secretary of State in 1906, *by its terms*, it was not to have actual operation and practical effect, until the election in 1908, the first time when an election for sheriff was to be held under its provisions. That a statute or constitutional provision may have a *potential existence*, but which will not go into actual operation until a future time, is familiar law."

In *Seneca Mining Co.* v. *Secretary of State*, 47 N. W. (Mich.) 25, the court, at page 26, said:

> "Without the authority conferred upon the legislature by this amendment to the Constitution, the Legislature would have no authority to authorize the extension of corporate existence, such as this. The important question, which is, therefore, presented is, when would the amendment adopted by the electors in April, 1899, *take effect as a part of the Constitution?* We must look to that instrument for a reply." (Italics ours.)

In *State ex rel. Stevenson* v. *Tufley*, 22 Pac. (Nev.) 1054, the court said:

> "An act of the Legislature which is not authorized by the State Constitution at the time of its passage is absolutely null and void. It is a misnomer to call such an act a law. It has no binding authority, no vitality, no existence."

Speaking of the effective date of a constitutional amendment, the court, in *People* v. *Gardner*, 59 Barb. 198, at p. 205, said:

> "It is suggested that the new judiciary article (Article 6, *supra*) was 'adopted' when the state canvassers had completed their canvass of the votes. Undoubtedly the electors had adopted the article. They had done all they were authorized by law, to do; but the article was not to become law until a future day. Until that time arrived it was silent and affected no one."

This last case was affirmed in *People* v. *Gardner*, 45 N. Y. 812, where the court, in referring to Article 6, *supra*, which was adopted by the people in November, 1869, said, page 814:

> "* * * the new judiciary article took effect upon the first day of January, 1870, and on and from that day *became operative* as a provision of organic law."

To the same effect, see *People* v. *Norton*, 59 Barb. Sup. Ct. Rep. (N. Y.) 169; *Real* v. *People*, 42 N. Y. 270.

In *Correllis* v. *State*, 82 So. (Fla.) 601, the court had under consideration an amendment to the State Constitution, which prohibited the manufacture, sale, etc., of intoxicating liquors. The constitutional amendment was in three sections and is substantially similar in all respects to the Eighteenth Amendment to the Constitution of the United States. Among other things, the court said:

> "**By the terms** of this amendment it was to 'go into effect on the first day of January, A. D. 1919.' This of itself rescued the amendment from the provisions of Article 17, by which amendments to the Constitution become effective upon receiving the approving majority of the votes of the electors at the election * * *."

This case was followed by *Neisel* v. *Moran*, 85 So. (Fla.) 346. This case is substantially on all fours with the case now presented by the petitioner. The prohibition amendment to the Constitution of Florida is

substantially similar in all respects to the Eighteenth Amendment. The act of the Florida Legislature to make effective the amendment to the Florida Constitution is, or was, at the time this decision was rendered, substantially similar to the National Prohibition Act and was passed, as was the Volstead Act, in anticipation of the amendment becoming effective. The Florida act was declared constitutional, however, but it was found to be valid because of the plenary power residing in State legislatures to pass any law *not forbidden* by the State Constitution. In making this case applicable to the contention of the petitioner here made, it is important to note the distinction made by the Florida court between Federal power and State power. At page 360 (85 So. 346), the court said:

> "The Supreme Court of the United States has held the act of Congress of October 28th, 1919, known as the Volstead Prohibition Enforcement Act, to be a valid law, *although it was passed by Congress before the Eighteenth Amendment to the Federal Constitution became effective,* on January 16th, 1920, and although Congress *has no Legislative power except such as is granted* to or conferred upon it by the Constitution of the United States. *Rhode Island* v. *Palmer,* 252 U. S. ——, 40 Sup. Ct. 486. If the Volstead Federal Enforcement Statute, enacted October 28th, 1919, after the Eighteenth Amendment to the Federal Constitution had been adopted by the Legislatures of three-fourths of the States of the Union, *but before the amendment became effective,* January 16th, 1920, is a valid law, *when the Congress has no power* to enact laws, except as that power is granted by the Federal Constitution, then Chapter 7736, Laws of Florida, is a valid law, for the reason that the Legislature may enact any statute that is not forbidden by the State or Federal Constitution, etc."

Rhode Island v. *Palmer,* cited by the court, *supra,* was not decided in 252 U. S., but was one of the national pro-

hibition cases decided in 258 U. S. 350, and the court was under a misapprehension, when it took for granted, that the point in question was decided by the Supreme Court of the United States in that case. We have already pointed out, at the outset of this Brief and Argument, that the point made by the contention of the petitioner herein, was not decided in *Rhode Island* v. *Palmer*, or in any other case decided by the Supreme Court of the United States, which we have been able to find. It is worthy of note that the Florida court, apparently wishing to emphasize the correctness of its holding, drew the *a fortiori* conclusion, that if Congress, *without power* granted to it by the Federal Constitution, could pass a law, in anticipation of receiving that power, when the Eighteenth Amendment should become effective, then the Legislature of Florida had a right to pass the Statute in question. The language of the court signifies to our mind that the court, under the misapprehension that this point was decided by the Supreme Court of the United States, at least doubted the correctness of the decision, which it thought the United States Supreme Court had rendered in that case. In *Dunn* v. *County of Rock Island*, 283 Ill. 628 (636), it is said:

> "Upon the facts stated it is argued that if the Act prevents the building of the jail it is retroactive and an interference with constitutional rights. The act did not go into effect until July 1st, 1915, but under section 10* of Article 5 of the Constitution the act *became a law* of the State *upon its approval* by the Governor. The Act is to be construed as prospective, and its prohibition was not effective until July 1st, 1915. A statute passed to take effect at a future day is operative from that day and the intervening period is allowed to enable the public to become acquainted with its provisions, but until it *becomes operative as a law* the public are not compelled to govern their actions by it."
>
> ——*Misprint for Section 16.

See, also, *Board of Supervisors* v. *Keady*, 34 Ill. 293.

In *Pratt* v. *Allen*, 13 Conn. 119, the court said, at page 125:

> "The objection is, that since the amendment giving the election of sheriffs to the people, also directs that such election shall be made, in such manner as shall be prescribed by law, the Assembly must derive their power from this amendment; and as the Act of May, 1838, was prior to the final adoption of the amendment by the people, it was prior to the existence of power in the assembly, and so the act is void; in other words, that the amendment was a grant of power to the Legislature to legislate upon the subject; and that until the amendment received its consummating act, by the vote of the people, no power was conferred by it upon the Legislature. The objection proceeds upon the assumption that the Constitution of this State, *like that of the United States* confers upon the legislative department all the power it possesses; whereas, the fact is not so. The Constitution of the United States is a grant of powers, *where they did not before exist*; the Constitution of this State is a *limitation* of powers already existing."

In *Owing* v. *Speed*, 5 Wheaton Rep. 420, Chief Justice Marshall held that an act, passed by the State of Virginia, with reference to certain lands was not void as being in conflict with Section X of Article I, of the Federal Constitution, prohibiting a state from passing "any law impairing the obligation of contracts." In urging this case, in support of the contention of the petitioner, we call the court's attention to the fact that Article 7, of the Constitution of the United States provides that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." Virginia was among the nine States first ratifying. New Hampshire was the ninth State to ratify and this it did, June 21st, 1788, and thereupon the Constitution of the

United States became established. Subsequently, but before March 4th, 1789, the act of the Virginia Legislature was passed, but it was held to be valid because the Constitution of the United States in its entirety did not go into effect until March 4th, 1789.

In 28 Cyc., p. 365, it is said:

> "A municipal charter in whatever form is a statute of the State, and the organic law of the corporation. It gives the municipality its power to enact by-laws, just as the Federal Constitution gives the Congress its power of legislation."

Bearing in mind this analogy between the power of a municipality and the power of Congress, we cite the case of *Ellis* v. *City of Cleburne*, 35 S. W. (Tex.) 495, (writ of error denied by the Supreme Court.) The Constitution of Texas provided that—

> "If it shall appear from the election returns that a majority of votes have been cast in favor of any Constitutional Amendment, the said Amendment *shall become a part* of the Constitution and proclamation shall be made by the Governor thereof."

The court held that an amendment to Article 8 of the Constitution, authorizing certain cities to incur indebtednesses for the erection of water works, which was adopted by a vote of the People on August 14, 1883, and the result proclaimed by the Governor on September 25, 1883, was not *in effect* on September 13, 1883, so as to authorize a city *on that date* to incur an indebtedness for the erection of certain water works. The court held in substance the following propositions:

> A. An Ordinance is without authority and void which is passed in anticipation of a Constitutional Amendment, which, when effective, would confer such authority.
>
> B. A contract made by the City was not valid by reason of having been made in anticipation of the adoption of the Amendment.
>
> C. If the Ordinance, authorizing the execution of

the contract, was enacted *before* the Constitutional Amendment *became operative,* and was, therefore, invalid, the contract based upon the Ordinance was likewise void, even though it was not delivered until October 1, 1883, after the Amendment became operative.

D. A City cannot ratify a contract which at the time it was entered into was *ultra vires.* A subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. (Citing Dillon on Municipal Corporations, 4th Ed., Sec. 463.) No subsequent Act can make an *ultra vires* contract effective.

To the same effect, see *Reade* v. *City of Durham,* 92 So. (N. C.) 712; *City of Duluth* v. *Duluth St. Ry. Co.,* 62 N. W. (Minn.) 267.

We have cited and quoted excerpts from the principal cases supporting the contention of the petitioner. Other cases to which we respectfully refer the court are:

Price v. *Hopkins,* 13 Mich. 318.

Bilbrey v. *Poston,* 63 Tenn. 232.

Girdner v. *Bryan,* 67 S. W. (Mo.) 699.

Phy v. *Wright,* 146 Pac. (Ore.) 138.

Schwartz v. *Leiberman & Co.,* 2 Tex. App. Civ. Cases, Sec. 289.

Hamilton v. *Vaughan,* 170 N. W. (Mich.) 554.

DeWar v. *People,* 40 Mich. 401.

State v. *Cain,* 28 So. (La. Ann.) 226.

State v. *Schnitzer,* 95 Pac. (Wyo.) 698.

State v. *Kyle,* 65 S. W. (Mo.) 763.

Lloyd v. *Hamilton,* 27 So. (La. Ann.) 275.

Point I.

B.

Objections Answered.

(1) The Supreme Court of the United States has not had this objection to the validity of Title II of said act presented to it in any case heretofore arising. It was not passed upon in *Rhode Island* v. *Palmer*, or any of the other cases included within the *National Prohibition* cases, 253 U. S. 350. In those cases the contention that the Volstead Act was invalid, was, as we read the decision, based upon the major contention that the Eighteenth Amendment itself was unconstitutional. The court at the outset in those cases said:

> "We here are concerned with seven cases involving the validity of that amendment and of certain general features of the National Prohibition Law, known as the Volstead Act."

Mr. Justice McKenna, in his dissenting opinion, said:

> "This case is concerned with the Eighteenth Amendment to the Constitution of the United States, its validity and construction."

Neither was it decided in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 164. The contention there was that the Eighteenth Amendment denied to Congress, before its effective date (January 16, 1920), the power to pass any prohibition of the liquor traffic, the argument being that the amendment guaranteed to manufacturers and dealers a year's grace. The decision of the court (p. 164) was to the effect that the Eighteenth Amendment was not a denial of the war power of Congress; the only point decided was that Congress had power to pass such prohibition *as a war measure* for the conservation of the resources of the country, and that the Eighteenth

Amendment did not operate to destroy or curtail that power.

In *Ruppert* v. *Caffey*, 251 U. S. 264, Elihu Root and William D. Guthrie argued that:

> "The language of the Eighteenth Amendment presents a very grave question as to the power of Congress to enact prohibition legislation *effective before* the expiration of one year from the ratification of that amendment."

It will be noted that the objection merely went to the power of Congress to pass such legislation *effective immediately*, and involved only Title I of the Volstead Act, counsel taking it for granted that Title I was passed pursuant to the provisions of the Eighteenth Amendment. The objection did not assert the lack of a then present power in Congress to legislate at all on the subject. The court held that Title I was not passed pursuant to the Eighteenth Amendment, but pursuant to the war powers of Congress. The court said, page 301:

> "Prohibition of the manufacture of malt liquors with an alcoholic content of one-half of one per cent or more, is permissible *only because* in the opinion of Congress the war emergency demands it."

Objections Answered (Cont'd).

(2) Article 5 of the Constitution of the United States, which provides that amendments when ratified by the Legislatures of three-fourths of the states "shall be valid to all intents and purposes, as part of this Constitution," in nowise negatives the construction here contended for by petitioner, viz: that the Eighteenth Amendment did not become *an operative* or *effective* part of the Constitution until January 16, 1920. Such construction is consistent with the provisions of Article 5. If the Eighteenth Amendment had specified no time when it was to go into effect, it undoubtedly would have become operative, immediately upon its ratification under the provisions of Article 5. To paraphrase the language of the Supreme Court of Florida, in *Correllis* v. *State,* 82 So. (Fla.) 601, (heretofore quoted):

> "By the terms of this Amendment it was to go into effect on the 16th of January, 1920. This of itself rescued the Amendment from the provisions of Article 5."

The Eighteenth Amendment upon its ratification became no doubt a part of the Constitution and was valid to all intents and purposes, but until January 16th, 1920, it did not go into effect; it was unenforceable; it did not become an *operative* part of the Constitution; it lay dormant; suspended; *ex proprio vigore* it had no force; its existence as law was potential; it was silent and affected no one; it vested no power. The situation presented has its analogy in state statutes and state constitutional amendments. Speaking of a constitutional amendment the court in *State* v. *Cain,* 28 So. (La. Ann.) 226, said:

> "* * * it and every part of it was intended to lie dormant and directed to lie dormant until, etc.; * * * everything pertaining to the article, * * * was suspended until, etc."

And the court, in *State* v. *Dircks,* 111 S. W. (Mo.) 1, (*supra*), also speaking of a constitutional amendment, said:

> "While the amendment *became a part* of the Constitution from the time of the canvass of the votes, * * * *by its terms,* it was not to have actual operation and practical effect until, etc. * * * That a statute or *constitutional provision* may have a *potential existence,* but which will not go into actual operation until a future time, is familiar law."

State statutes are generally passed and approved prior to their effective dates. By the Constitution of Illinois, for instance, laws take effect on the first day of July next after their passage, unless an emergency exists. After their passage and approval they become *a part* of the statutes of the State, and unless they offend against some constitutional provision, they become valid law; but until the time arrives when they shall go into effect, they confer no power, speak with no authority, are silent and affect no one. Such was the holding in *Dunn* v. *County of Rock Island,* 283 Ill. 628 (636 heretofore quoted). In the case last cited, it was held that until a law becomes operative as a law the people are not compelled to govern their actions by it.

So with the Eighteenth Amendment. It became a part of the Constitution under Article V upon its ratification, but it did not *become operative* as law until, by its own terms, it went into effect January 16th, 1920. The intervening period was allowed to enable the public to become acquainted with its provisions, and to adjust itself to its inhibitions. During that period it was apparently intended by the legislatures of those States which ratified it, to be altogether operative or else altogether inoperative. There is no language in any of its sections which would make it operative for one purpose and inoperative for another. Nowhere does it specify that

Congress should have authority to pass legislation under it to become effective prior to the expiration of the one year period of limitation fixed in section 1. Certain it is, at least, that the amendment as law was inoperative to grant Congress power to enact Title II of the National Prohibition Act to become effective immediately on its passage. As it was inoperative for that purpose, it was, during the period between ratification and January 16th, 1920, inoperative altogether. Congress, having no constitutional authority to enact Title II of the Volstead Act to become effective immediately, had no constitutional authority in October, 1919, to make Title II effective in the future. As heretofore stated, a State Legislature under its plenary power may enact a statute which, while it becomes law immediately upon passage and approval, does not come to life until the time fixed by the State Constitution; but unlike a State Legislature, the very power of Congress to legislate does not come to life or into being until a constitutional amendment goes into effect.

Under Article V of the Constitution, the Eighteenth Amendment upon ratification might have become "valid to all intents and purposes as part of this Constitution" without having granted to Congress any power whatever. Witness for instance the Ninth, Tenth and Eleventh Amendments, which are completely self-executing in their provisions and in their nature, grant no power to Congress and yet became "valid as part of the Constitution" upon ratification. Suppose that the Eighteenth Amendment had been submitted and ratified in such form as to be completelyself-executing in its provisions, with its present Section 1, unaltered and an added provision specifically denying to Congress power to legislate on the subject of intoxicating liquors. Or suppose such amendment without a provision specifically deny-

ing that power of Congress; for, if the amendment were completely self-executing, it would impliedly deny such power to Congress anyway. Would anyone doubt, but that, upon ratification, the amendment, as supposed, became "valid to all intents and purposes as part of this Constitution" under Article V? And would anyone doubt but that also such amendment, while "valid as a part of the Constitution" upon ratification, remained inoperative until January 16th, 1920? If the amendment, as supposed, could deny power altogether to Congress to legislate, and, at the same time, be consistent with Article V, then there is no good reason why the amendment, as ratified, was not consistent with Article V, while remaining inoperative to grant power to Congress to legislate until January 16th, 1920. In fact, if the self-executing provisions of the amendment, as supposed, would remain inoperative until January 16th, 1920, it would seem, *a fortiori*, that the power granted to Congress, by the amendment as ratified, to execute its provisions, should remain inoperative until January 16th, 1920.

Perhaps the situation presented by the Eighteenth Amendment in its relation to Article V of the Constitution can best be described as being comparable to the National Bankruptcy Act in its relation to State Insolvency Statutes. The going into effect of a Federal bankruptcy act automatically *suspends* the operation of a state insolvency statute covering the same ground. It is said in 14 R. C. L., p. 633:

> "But a State statute is not thereby repealed; its *operation is only suspended* during the period the national act remains in force. On the repeal of the Bankruptcy Act a State insolvency statute comes in operation without re-enactment and applies to acts occurring during its suspension. * * * It is not the passage of the federal act, but it is the taking effect thereof, which suspends the State statutes.

> The State courts may continue to conduct insolvency proceedings during the interval between the passage of the act and the time set for its effect. * * * Even during the operation of a federal act, a State Legislature may pass an insolvency act. Such an act, as to the subject matter, covered by the federal act, will remain ineffective until the repeal of the latter, but then comes into force."

In other words, the State insolvency laws, where they do not offend against some provision of the State or Federal Constitution, are "valid to all intents and purposes as part of the statutes of the State," while at the same time, during the period a federal act is in force, they are unenforceable, inoperative, confer no authority, grant no power, are silent and affect no one; they exist potentially but are of no force or effect whatever. So with the Eighteenth Amendment. Upon its ratification it was "valid to all intents and purposes as part of the Constitution," while at the same time, during the interval between ratification and January 16th, 1920, when as said in *Dillon* v. *Glos, supra,* the amendment, "by its own terms was to go into effect," the several state statutes regulating the manufacture and sale of intoxicating liquor were in full force and effect *as supreme law* within each particular state, and *the operation* of the Eighteenth Amendment *was suspended* until January 16th, 1920.

That an amendment may be ratified pursuant to the provisions of Article V of the Constitution, thereby becoming valid as part of the Constitution, and at the same time be inoperative, is further evidenced by the provisions of Section 3 of the Eighteenth Amendment, which reads:

> "This article shall be *inoperative* unless it shall have been ratified as an amendment to the Constitution, within seven years from the date of the submission hereof to the states by the Congress."

Article V of the Constitution fixes no limitation of time for ratification; it simply provides that an amendment when ratified by three-fourths of the States shall be valid as part of the Constitution. Hence, we take it, that if the Eighteenth Amendment had not been ratified within the seven year period of limitation, but had been ratified shortly thereafter, it would have nevertheless been valid under the provisions of Article V as a part of the Constitution, although of course an inoperative part of it. Congress apparently took for granted that the amendment, no matter when ratified, would become *valid as part* of the Constitution in accordance with the provisions of Article V upon ratification by three-fourths of the States, even though the amendment might expressly declare otherwise. Manifestly the word "inoperative" was used advisedly. The words "invalid," "void," "shall not be valid as a part of the Constitution unless, etc." would have run counter to Article V, since under that article the amendment would, no matter what words were used, be valid as part of the Constitution. But the word "inoperative," appearing in Section 3 of the Eighteenth Amendment, is not inconsistent with the words "valid as part of" appearing in Article V of the Constitution. As already pointed out, State insolvency laws are "valid as part of State statutes," although *inoperative* when touching the same subject matter as a federal bankruptcy law. So a State statute may become *a valid law* when passed and approved although inoperative until a future day when *it is to go into effect.*

Dunne v. *County of Rock Island*, 283 Ill. 628 (*supra*).

If the Eighteenth Amendment could *by its own terms* fix, in one section, a period of limitation, after which it would be *inoperative*, even though ratified subsequently to the period thus fixed, then no good reason appears,

why the amendment could not *by its own terms* also fix, in another section, a period of limitation within which, after ratification, it would be *inoperative.* And this we contend it did, fixing by virtue of section one (1) the period of one year within *which, after ratification, it* was to be *inoperative.*

Objections Answered (Cont'd).

(3) It will not do to say that the prohibition of the Eighteenth Amendment went into effect January 16th, 1920, but that the Eighteenth Amendment itself went into effect when ratified, on January 16th, 1919, or to put it another way, that the prohibitory portion of the Eighteenth Amendment went into effect January 16th, 1920, while the Eighteenth Amendment itself went into effect when ratified. This, for the reason, that the prohibition of the Eighteenth Amendment is not one thing and the Eighteenth Amendment another thing. The prohibition *is* the Eighteenth Amendment, and the Eighteenth Amendment *is* the prohibition. The Eighteenth Amendment has no existence, except as a prohibitory law. It is incorrect and misleading to speak of the "prohibitory portion" of the Eighteenth Amendment. The amendment is an indivisible unit and cannot be divided into parts or portions; as was said in *Board of Supervisors* v. *Keady*, 34 Ill. 293 (296):

> "The court is not aware of any rule by which an act of the Legislature, regulating the rights and duties of citizens, becomes a law, piece-meal * * *."

The purpose of the Eighteenth Amendment was to prohibit intoxicating liquors. If the amendment was ineffective for that purpose until January 16th, 1920, then, until that time arrived, it was ineffective for the entire object of the law.

See *People* v. *Rose*, 166 Ill. 422 (430).

Objections Answered (Cont'd).

(4) It will not do to say that the Eighteenth Amendment became effective as an *operative* part of the Constitution, when ratified by the Legislatures of three-fourth of the States, and that it merely fixed a time in the future for the inhibition of liquors, for if so, it became by virtue of Section 2, Article 6, of the Constitution of the United States the supreme law of the land. And necessarily, if so, it became the supreme law of the land the moment it was ratified. But by Article 10 of the amendments to the Constitution, the powers not delegated by the States were reserved to them. If, therefore, in the interim between the ratification of the Eighteenth Amendment, and the date when it went into effect, to-wit, January 16th, 1920, a State had passed a law or had adopted an amendment to its Constitution, self-executing in its provisions, regulating the manufacture and sale of intoxicating liquors, it would scarcely be contended that such law, or such amendment, would be in violation of the Eighteenth Amendment, as that amendment *by its terms* did not go into effect until January 16th, 1920. Such a law, or such an amendment, would not be in conflict with the Eighteenth Amendment, because no question of conflict could arise until there was a law *in force and effect* which would give occasion for the conflict. The situation thus described is also paralleled by the operation and effect of State insolvency laws in their relation to the National Bankruptcy Act. The law in reference thereto is stated in 14 R. C. L., p. 633, as follows:

> "The State courts may continue to conduct insolvency proceedings *during the interval between* the passage of the act and *the time set for its effect.*"

Such a law, or such an amendment, would, under the

provisions of Article 10 of the amendments to the Constitution of the United States, be the supreme law within the State which enacted or adopted it. If so, the Eighteenth Amendment would not be the supreme law of the land within that State; but this cannot be, for there cannot be two supreme laws. Therefore, we must conclude that in the interim existing between the ratification of the Eighteenth Amendment and the 16th of January, 1920, the Eighteenth Amendment was not the supreme law of the land, and, therefore, was not an *operative* part of the Constitution of the United States.

Objections Answered (Cont'd).

(5) It will not do to say that Section 2 of the Eighteenth Amendment conferred power on Congress to pass Title II of the National Prohibition Act in October, 1919.

Section 2 of the Eighteenth Amendment provides:

> "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

This section was ratified as an integral part of the Eighteenth Amendment. It was not ratified separately. It was an inseparable unit in an indivisible article. It added nothing to the power of Congress.

Its sole efficacy was to allow the several States the exercise of their original police power, not inconsistent with the first section of the Eighteenth Amendment.

See *U. S.* v. *Lanza*, 260 U. S. 377.

Whatever power Congress has to regulate the traffic in intoxicating liquors it received from the Eighteenth Amendment as a whole, and not from Section 2; as was said in *U. S.* v. *Cohen*, 268 Federal, 420 (Dist. Ct. E. D., Mo.), at page 425:

> "It may be considered that the provisions of the Volstead Act in so far as they provide for the exercise of police powers by the Congress, would have been unwarranted and unconstitutional before the adoption of the Eighteenth Amendment."

The second section of the Eighteenth Amendment, insofar as it relates to the power of Congress, merely confirmed the implied power which it received from Section 1, of the amendment.

See *Ex Parte Crookshank*, 269 Fed. 980, where, at page 986, the court said:

> "The truth is, in my judgment, that too much concern seems to have been manifested because of the incorporation of Section 2 into the Eighteenth Amendment. The power thereby sought to be conferred upon Congress would have been conferred by the adoption and ratification of Section 1 alone; a power being accorded to the Federal Government, Congress even in the absence of an express grant, would be authorized to legislate in the exertion of that power."

See, also, paragraph 18, section 8, of Article 1, of the Constitution of the United States. The court, in *Ex Parte Crookshank,* also quotes from Hamilton's 31st Number of the Federalist, as follows:

> "It may be affirmed with perfect confidence, that the continual operation of the intended Government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers."

In the *National Prohibition cases,* 253 U. S. 350, the court said:

> "I take it that if the second section of the article did not exist, no one would gainsay that the first section in and of itself, granted the power and imposed the duty upon Congress to legislate to the end that by definition and sanction the amendment would become fully operative."

It will be noted that when the Supreme Court, in *Dillon* v. *Glos,* 256 U. S. 368, 65 L. ed. 994, said that the Eighteenth Amendment, "by its own terms was to go into effct one year after being ratified," it spoke of the article as a whole; presumably, the court meant that Section 2 went into effect at the same time that Section 1 went into effect. This rule of construction is supported by the authorities.

In speaking of the constitutional provision to the effect that an act of the Legislature should not become a law until the expiration of sixty (60) days from the end of the session (such was the law in Illinois prior to 1870), the Supreme Court of Illinois, in *Wheeler* v. *Chubbuck,* 16 Ill. 361, held, that:

> "In order to take an act out of the constitutional provision the Legislature must direct that the act, as a whole and entirety, shall take effect at a different time; and that it is not sufficient that certain parts of it might bear a construction which would, taken separately, give those parts effect at an earlier period."

The court, on that occasion, said, that

> "the direction must be made in a clear, distinct and unequivocal provision, and could not be helped out by any sort of intendment or implication."

In *Schneider* v. *Hussey,* 1 Pac. (Idaho) 343, at p. 344, it is said:

> "It will not be contended that one section of an act will take effect or be in force at an earlier date than other sections, unless the act itself shall so state."

To the same effect, see, also, *State* v. *Williams,* 90 N. E. (Ind.) 754; *State* v. *Paul,* 151 Pac. (Wash.) 114; *McArthur* v. *Franklin,* 16 Ohio State, 193, 203; *Leyner* v. *State,* 3 Ind. 490; *Grant* v. *Alpena,* 107 Mich. 335; *State* v. *Edwards,* 136 Mo. 360; *Ex Parte AhPah,* 34 Nev. 283.

Objections Answered (Cont'd).

(6) It will not do to say that the Eighteenth Amendment, by becoming effective January 16th, 1920, validated the act of Congress of October, 1919.

In *State ex rel Stevenson* v. *Tufley,* 22 Pac. (Nev.) 1054, it is said:

> "The act being void, no subsequent adoption of an amendment to a Constitution, * * * would have the effect to infuse life into a thing that never had any existence."

See, also, *Girdner* v. *Bryan,* 67 S. W. (Mo.) 699.

Ellis v. *City of Cleburne,* 35 S. W. (Tex.) 495, to the effect that no subsequent act can make an *ultra vires* act effective.

See, also, *DeWar* v. *People,* 40 Mich. 401.

Point I.

C.

Conclusions.

We conclude, therefore, that when Congress attempted to pass Title II of the National Prohibition Act, in October, 1919, it was endeavoring to make operative and effective an amendment which itself at that time, was inoperative and ineffective for any purpose, and vested in Congress no power until January 16th, 1920, to pass any laws pursuant to it.

We conclude also that Article V in no way conflicts with the construction, which we here contend should be given to the Eighteenth Amendment, viz: that upon ratification it became valid as a part of the Constitution, but did not then become an operative or effective law.

We believe that we have established, on reason and authority, that Title II of the National Prohibition Act is in conflict with Section 1, of Article I, of the Constitution of the United States, providing that "all legislative powers herein granted shall be vested in a Congress of the United States, etc.," in that, the power sought to be exercised in October, 1919, was not one of the powers granted to Congress at that time; and is also in conflict with Section 8, of said Article I, which enumerates the powers of Congress, in that, the power sought to be exercised by Congress in October, 1919, is not enumerated among the powers granted to Congress by Section 8 of said Article I, and was not granted by any of the amendments to the Constitution of the United States in force and effect at the time Congress sought to enact Title II of the National Prohibition Act. The conclusion follows, that Title II of the National Prohibition Act is unconstitutional and void.

Point II.

Section 24 of Title II is an Invasion of the Judicial Power.

The legislative intent in drafting Section 24 of Title II of the National Prohibition Act was to provide for an expeditious mode of trying the many cases, which Congress prophesied would arise in the enforcement of the act. Hence the provision for trial without a jury before a chancellor and all under the guise and label of "contempt."

With the federal jurisdiction created by the Eighteenth Amendment, the Districts Courts are burdened by Section 24, with what was, prior thereto, the business of state police courts. So far reaching is the newly created federal police jurisdiction, that nothing is left to the con-

trol of the courts. Not even are the district courts permitted to exercise plenary discretion in trying contemptuous violations of injunctional orders under the act.

Section 24 provides:

> "Any person found guilty of contempt under the provisions of this section shall be punished by a fine *of not less* than $500 *nor more than* $1,000 or by imprisonment of *not less* than thirty days *nor more* than twelve months or by both fine and imprisonment."

Thus, if the evidence in a proceeding under Section 24 discloses that the contemnor was guilty of a trivial violation of the injunctional order, the chancellor could do nothing but fine the contemnor not less than $500 or imprison him for not less than thirty days. And this, though the court thought that a fine of $25 or imprisonment for two days was ample punishment for the infraction of the injunctional order.

As ancient as the courts themselves, is the power to punish contemnors of the authority of the judiciary. A court without power to compel obedience to its orders would be a useless institution. As said by Mr. Justice Brewer, in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, at page 326:

> "The power to punish for contempt is inherent in all courts. * * * (327). The purpose of contempt proceedings is to uphold the power of the court, and also to secure to suitors therein the rights by it awarded."

The law of the land is synonomous with the maintenance of the authority of the courts. Only by obedience to judicial mandate can personal and property rights be secure. Leave to personal choice obedience to judicial authority, and law and order would soon be chaos.

The very nature and purpose of a court, inherently

demands the power to punish for contempt. That power transcends legislative limitation and is not derived from any statute.

See *Ex Parte Terry*, 128 U. S. 289, 302.

The judicial power of the Federal Government is defined by Article III, Section 1 of the Constitution:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

And Article I, Section 8, par. 9 of the Constitution provides that Congress shall have power

> "To constitute Tribunals inferior to the Supreme Court."

Congress did exercise that power by the Act of 1831 creating the District Courts. In that act (now Section 268 of the Judicial Code) Congress defined the particular instances wherein the District Courts could exercise the power to punish for contempt; but did not in any wise interfere with the power of those courts fully to exercise that power in the particular instances listed in the act. In other words, the Act of 1831 is not a limitation upon the extent of the power to punish for contempt, but is a specification of the instances where the power may be exerted.

See *Interstate Com.* v. *Brinson*, 154 U. S. 447; *in Re Cuddy*, 131 U. S. 280; *Ex Parte Robinson*, 19 Wall. 504; *U. S.* v. *Toledo Newspaper Co.*, 220 Fed. 458 (affirmed in 237 Fed. 986, C. C. A. 6 Cir.); *in Re Judith Gap Commercial Co.*, 1 Fed. (2d Ser.) 508; *People* v. *Peters*, 305 Ill. 226.

The Supreme Court of California, in *Ex Parte Garner*, 177 Pac. p. 162, in sustaining the validity of a contempt statute, which authorized the imposition of a fine not ex-

ceeding five hundred ($500) dollars or imprisonment not exceeding five (5) days, or both, said, page 164:

> "The Legislature may not, whether by procedural rules, or the inadequacy of the penalty fixed, substantially impair or destroy the implied power of the court to punish for contempt; yet it may provide rules of procedure and fix *the maximum* penalty which, if adequate for the purpose designed, must be deemed operative in controlling the action of the court."

Many of the states have set a maximum penalty for the punishment of contempts, and these have usually been held to be valid, on the ground, that the Legislature has thereby made effective the Constitutional inhibition against the imposition of excessive fines, and the infliction of cruel and unusual punishments. We have searched the statutes of many states, and have been unable to find any statute which fixes a minimum penalty as a punishment for contempt other than so-called liquor statutes, which have for the most part been modeled after the National Prohibition Act. The fixing of a minimum penalty, clearly invades the discretion of the court in carrying into effect its inherent power to punish for contempt. Many instances might be supposed where a nominal fine or a few days in jail would be adequate punishment for the contempt charged. It can well be conceived that the imposition of a minimum fine of five hundred ($500) dollars, under the provisions of Section 24 of the National Prohibition Act, would, in many instances, be a violation of the constitutional provision, forbidding the imposition of excessive fines.

Point III.

Section 24 of Title II of the Prohibition Act Violates the Sixth Amendment to the Constitution.

The Sixth Amendment provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *; to be confronted with witnesses against them * * *."

As demonstrated in the preceding section of this argument, the minimum and maximum penalties of Section 24 do not comport with the plenary power of courts of equity to punish contemnors. If the section is to stand at all, it must stand as a definition of newly created crime to be tried without a jury.

A crime is defined to be "a wrong directly or indirectly affecting the public, to which *the State* has annexed certain punishments and penalties" (16 C. J. 951). What is Section 24 but an attempted definition of a wrong affecting the public to which the government has annexed punishments and penalties? It, therefore, seeks to define a crime of a distinct and separate class from contempt proper.

The section creates a new statutory crime; either that, or it is a manifest invasion of the judicial power. As a newly created statutory crime, it should be properly labeled, e. g., "Obstruction of Justice by Contempt," in analogy to such offenses as were unknown to the common law, but which have since been created and specially designated, e. g., "Larceny by Bailee," "Embezzlement by Agent," etc.

In *Ex Parte, in the Matter of Philip Grossman*, Petitioner, No. 24, Original, October Term 1924, it was de-

cided by this court that contempt of court was an offense against the United States within the pardoning power of the President. Nowhere in the opinion of the court is Section 24 of Title II of the National Prohibition Act referred to. This court, in the *Grossman case,* seems to have treated only of that class of contempts which was known to the common law. It does not seem to have been pointed out to the Court, in that case, that the criminal contempts provided for in Section 24 were, as shown hereafter, unknown to the common law, and to the framers of the Constitution. The conclusion, that common law contempts only were under consideration by the court, we deduce from the use by the court of the words, "common law contempts" and from the reasoning of the court to the effect that "offenses against the United States" included "common law offenses in the nature of contempts against the dignity and authority of United States Courts" and that since the king of England, prior to the Revolution, had power to pardon contempts of court, the framers of our Constitution with the background of the common law and English history in mind, intended, in drafting the Constitution, to include offenses in the nature of contempts, within the scope of the pardoning power of the President. As a predicate for the argument, which we make following, we desire to call the court's attention to two statements from the Grossman opinion—first, "For civil contempts, the punishment is remedial and for the benefit of complainant and a pardon cannot stop it;" second, "while contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis,* and not criminal prosecutions, within the Sixth Amendment or common understanding." When this court speaks of contempts as being of-

fenses *sui generis*, we take it that the court has reference to what we might term contempts "proper," and that merely because a statute declares some act of omission or commission to be a contempt, it would not thereby necessarily be a contempt and an offense *sui generis*. We take it, that, if Congress were to authorize a court of equity, to enjoin citizens from violating the whole category of crimes, and were to enact a statute making the violation of such injunction punishable as a contempt, that the court would not sustain any such violations as contempts and as offenses *sui generis*. Having laid this foundation, we now proceed to the argument that Section 24 of Title II, violates the Sixth Amendment to the Constitution.

A contempt proceeding, under Section 24, can be brought only as a result of the violation of an injunction which has issued under Section 22, which provides for the issuing of an injunction to suppress nuisances. But a bill for injunction, under Section 22, is a civil proceeding. Such bill may be brought in the name of the United States by the Attorney General of the United States, or by any United States attorney, or by any prosecuting attorney of any state, or by the commissioner or his deputies or assistants. The United States does not appear in its sovereign capacity, complaining of the violation of its criminal law, but comes into court only as a suitor seeking a remedy. It may be said, without fear of contradiction and without the citation of any authorities, that all actions to enjoin are civil actions.

A proceeding brought for the violation of an injunction is likewise a civil proceeding in most instances.

See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (injunction to restrain boycotting); *O'Brien* v. *People*, 216 Ill. 354 (injunction to restrain injuring complain-

ant's business); *People* v. *Peters*, 305 Ill. 226 (contempt for violating a final order in quo warranto proceedings).

A case directly in point is *People* v. *Buconich*, 277 Ill. 290. This was a proceeding in contempt for the violation of an injunction issued upon a bill to enjoin the keeping of a house of ill fame *as being a nuisance*. The suit was brought *in the name of* the People of the State of Illinois. The court said, page 294:

> "The bill for an injunction is a civil suit. It does not seek to enforce any criminal liability or impose any punishment. Its sole object is to restrain the maintenance of a nuisance. The remedy is purely civil, and the proceeding to punish for contempt in violating the injunction is also civil."

To the same effect see:

State v. *Murphy*, 41 Atl. (Vt.) 1037.

If contempt of court, as provided for in Section 24 of Title II, is something different from a common law contempt, then it follows that the reasoning of this court in the *Grossman case*, No. 24 Original, does not apply to contempts provided for in Section 24, as the framers of the Constitution had in mind to include within the pardoning power of the executive, and to exclude from the Sixth Amendment, only such contempts as were known to the common law, in other words, common law contempts; any change in the nature of contempts, as they were known to the common law, at and prior to the adoption of the Constitution, or any enlargement thereof, could not be said to be in the minds of the framers of the Constitution. Hence, if the contempt provided for in Section 24, is not a common law contempt, then it is not included within the scope of the pardoning power. It can be brought within the scope of the pardoning power, only by treating it as a distinct crime, created by Sec-

tion 24, and the proceeding to punish it under Section 24, as a criminal prosecution.

If the contempt provided for in Section 24, is not a common law contempt, and if the proceedings to punish it are "criminal prosecutions," within the meaning of the Sixth Amendment, then certainly Section 24 is unconstitutional, because it provides that the court "may summarily try and punish the defendant."

Is the contempt provided for in Section 24, a common law contempt, and are the proceedings provided for in Section 24 to punish the violation of an injunction, "criminal prosecutions"?

The contempt, so provided for, is not a common law contempt, for the following reasons:

1st. Without Section 24, the court would have the undoubted right to punish a violation of an injunction, issued under Section 22, under the provisions of Section 268 of the Judicial Code, or it would have such right under the common law, pursuant to its inherent power to punish for contempts. But we have demonstrated that such a proceeding would be a civil one, and the contempt involved would be civil, and not criminal. And for civil contempts a fine only could be imposed.

See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418.

This was likewise the rule at common law.

Moreover, "For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it."

See *Ex Parte, in the Matter of Philip Grossman,* Petitioner, No. 24, Original.—October Term, 1924.

2nd. At common law the defendant in a criminal contempt proceeding had the right to purge himself of the

alleged contempt by filing a sworn denial. In 13 C. J. p. 74, Section 109, it is said:

> "At common law the sworn answer of the accused validly denying the alleged contempt was absolutely conclusive and entitled defendant to be discharged."

See, also, *People* v. *Gilbert*, 281 Ill., p. 619; *People* v. *McDonald*, 314 Ill. 448; *Kirk* v. *U. S.*, 112 C. C. A. 531. But this is not so under Section 24, for as is therein recited, "the trial may be had upon affidavits *or either party* may demand the production and oral examination of the witness."

The proceedings under Section 24 to punish the violation of an injunction issued under Section 22, are criminal prosecutions for the following reasons:

1st. Nowhere in Section 24 is it provided specifically, that the violation of an injunction is or shall be a contempt of court. It provides that "In the case of the violation of any injunction * * * the court * * * may summarily try and punish the defendant." For what? Presumably for the offense of violating an injunction. The offense is tried as a distinct crime. No statute was needed to confer jurisdiction on a court to try an injunction violator for contempt. "The defendant is to be punished" not the *respondent*, and the defendant is to be punished, as later appears in the section, by imprisonment, if the court so wills. The language imports a criminal prosecution. But the section takes it for granted that the trial shall be for contempt, without specifically so providing. The language is this, "The proceedings for contempt shall be commenced by filing, etc."

2nd. The language of Section 24 measures up to the definition of a crime. See 16 C. J. 951 (quoted *supra*). The Government by statute fixes the penalties—a mini-

mum and a maximum—and not the court. The discretion of the court is confined within limits, just as in criminal statutes.

3rd. The violation of an injunction ceases to be what it was at Common Law, and what it was, at and prior to the adoption of the Constitution, viz: a civil wrong or tort, to-wit: a civil contempt, but becomes instead something criminal. That something is a criminal offense, and not a criminal contempt, even though the statute may call it such; it could only be a criminal contempt, if it were directed against the power, dignity or authority of the court; its nature cannot be changed by calling it what it is not. Like the violation of an injunctional order abating a house of ill-fame as a nuisance, its nature is civil. See *People* v. *Buconich,* 277 Ill. 290. The primary purpose of the proceeding, is to enforce the civil remedy of the United States, the complainant in the equity suit, against a defendant, who is the other party to the equity suit. Such proceedings are not brought to vindicate public authority, since, for that purpose, the United States Government has an adequate remedy by enforcing its criminal statutes.

That the contempt is civil in its nature, is recognized by public officials charged with its prosecution. The uniform practice in such proceedings, as it was in this case (Rec., ...), is to institute, entitle and try such proceedings as part of the main cause in equity. This is an important test in determining whether a proceeding be civil or criminal.

Gompers v. *Bucks Stove & Range Co.,* 221 U. S. 418.

4th. At common law, at and prior to the adoption of the American Constitution, the maintenance of a public nuisance was a crime, punishable and abatable in the courts of criminal jurisdiction only. Hence, the effect of

making such an offense punishable and abatable in a court of chancery, is to deprive a defendant of his constitutional right, to have an indictment preferred against him, and a trial by jury. In *Hedden* v. *Hand*, 107 Atl. (N. J.) 285 (holding a statute unconstitutional, similar to the one here in question), the court said:

> "It is idle to entertain the thought for a single moment that the Legislature can change the nature of an offense by changing the forum in which it is to be tried."

To the same effect see *U. S.* v. *Lot* 29, *Blk.* 29, *Highland Park*, 296 Fed. 729 (holding Sec. 22 unconstitutional and inferentially Sec. 24 also).

5th. Section 24 provides that upon an information filed the court "shall forthwith cause a *warrant* to issue, under which the *defendant* shall be *arrested.*" Here we have the application of a strictly criminal proceeding, viz: "Warrant" and "arrest," not rule to show cause, citation or attachment.

We conclude, therefore, that since the offense mentioned in Section 24, is not a common law contempt, and since it is civil in its nature (—that is, if such offense is treated as a contempt), then it is not within the pardoning power; and if it is not within the pardoning power it is not "an offense against the United States"; yet the United States has imposed criminal penalties; we have also shown that the proceedings under Section 24, to punish the offense of violating an injunction are criminal prosecutions; therefore, the offense mentioned must be a statutory crime.

Point IV.

The Injunctional Order upon which the judgment is founded is absolutely void as District Courts are without power and are expressly prohibited by Equity Rule 73 from granting temporary injunctions without notice.

By Sections 913 and 917 of the Revised Statutes, the Equity Rules are given the same force and effect as Acts of Congress. These rules constitute a part of the Judicial Code. Rule 73 provides:

> "No preliminary injunction shall be granted without notice to the opposite party."

This rule goes to the source of the power of the District Court to enter the injunctional order. Its effect is to prohibit the exercise of the injunctive power without complying with its terms. Unless notice of the application for an injunction be given to the defendant, the District Court is shorn of power to act. Thus the rule goes to the jurisdiction of the court to enter an injunctional order.

It calls for no extended argument to show that an injunction granted by a court without power or jurisdiction to enter it is absolutely void and cannot be the basis of a valid contempt proceeding. A void injunction cannot serve as the basis of a valid judgment finding a party guilty of contempt for violating it.

Drew v. *Hogan*, 26 App. Cas. D. C. 55, 61.

Cathey v. *Norfolk & W. Ry. Co.*, 228 Fed. 26 (C. C. A. 4th Cir.).

Bank of United States v. *White*, 8 Peters 262, 269.

Northwestern Mut. Life Ins. Co. v. *Keith*, 77 Fed. 374.

United States v. *Barber Lumber Co.*, 169 Fed. 184.

The court will note that a temporary restraining *order* was *not* issued in this case. The order here is that of a temporary *injunction* and is in fact so entitled. The language of the order is:

> "It is ordered that pending the final hearing and determination, and until the conclusion of the trial of said bill for injunction against said nuisance, etc."

The record does not disclose, and the government did not attempt to prove that the petitioners were notified of the application upon which the injunctional order was based.

Section 22 of Title II of the Prohibition Act provides:

> "An action to enjoin any nuisance defined in this title may be brought in the name of the United States * * * *Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases.* If it is made to appear that such nuisance exists, *a temporary writ of injunction shall forthwith issue.*"

So the recital is that the proceeding under Section 22 "shall be brought and tried as an action in equity." As an "action in equity" the Equity Rules control the procedure; and Rule 73 is positive in its command that:

> *"No preliminary injunction shall be granted without notice to the opposite party."*

Not a word appears in Section 22 from which even an inference can be drawn, that it is not necessary to notify a defendant of the application for injunction. Even though there were such inference, it would have to yield to the positive declaration of the section, that "such action shall be brought and tried as an action in equity."

Clearly Section 22 provides for a temporary injunction in the usual form of equity procedure—that and nothing more. The settled course of equity procedure in the Federal courts gave to the petitioners the substantive right

of notice of the application for the temporary injunction. No such notice was given them prior to the entry of the injunctional order.

It follows, that the injunction herein, was entered in violation of Equity Rule 73, by a court expressly prohibited by the said rule and its statutory reaffirmation, from entering it without notice to the petitioners. Thus the entire contempt proceeding was void *ab initio.*

Point V.

The specific restraints of the Injunctional Order must be considered as though incorporated into the language of Section 24 of Title II. So construed that section would not contain the word "removed". As the information for contempt is the jurisdictional pleading, and as the information related solely to acts of removal, it is apparent from the face of the record that the court was without jurisdiction.

Section 24 of Title II is specific in its definition of the moving information as the jurisdictional pleading. Part and parcel of the information, indeed the essence of its vitality is the injunctional order which it charges to have been contemptuously violated. And the information sets forth the substance of the injunctional order, viz:

> " * * * be restrained and enjoined from keeping, using, maintaining, dealcoholizing, or otherwise permitting and aiding, abetting or assisting the keeping, using or maintaining of said premises as a place where intoxicating liquor was manufactured, sold, kept, bartered, dealcoholized or otherwise disposed of."

Thus not a word appears as to "removal".

The information sets forth three alleged overt acts of contempt and each relates to a "removal".

This is not a case involving a defective statement of

an offense within the jurisdiction of the court. Here the information wholly fails to state an offense of any kind. And the jurisdiction of the court is dependent upon the injunctional order; for under Section 24 of Title II the particular elements restrained in an injunction under Section 22 should be considered as written into the former section. In other words, the injunctional order, in the instant case imposes the following restraints:

> "* * * No liquor shall be manufactured, sold, kept, bartered, dealcoholized or otherwise disposed of."

These quoted restraints must be construed, in this case, as though they were contained in the body of Section 24. To illustrate, take the last sentence of Section 24:

> "Any person found guilty of contempt (in violating an injunctional order providing that no liquor shall be manufactured, sold, kept, bartered, dealcoholized, or otherwise disposed of) under this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment."

The section as so reading does not inhibit "removing". Wherefore, "removals" are not within the jurisdiction of the court as invoked in a proceeding thereunder which basically—that is by the injunctional order—does not restrain or inhibit a "removal".

In *Gompers* v. *Buck Stove & Range Co.*, 221 U. S. 418, the court ruled that proceedings for criminal contempts are criminal cases and that

> "it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself."

The information for criminal contempt is governed by the same rules of criminal pleading as apply to criminal

cases (*Gompers* v. *Bucks Stove & Range Co., supra; Galligan* v. *U. S.*, 282 Fed. 606; *Crites* v. *State,* 105 N. W. (Neb.) 469, 471.) At this late date it must be admitted that no intendments or presumptions of the trial court can be invoked to bolster up a judgment for criminal contempt. The proceeding is criminal in its nature and the rules governing criminal proceedings control.

Section 24 of Title II in defining the jurisdiction of the District Court, says:

> "The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the *alleged facts constituting the violation* whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested."

The only *"facts constituting the violation" in the instant case are the first three described overt acts of the information for contempt*—acts of "removal".

True each of the three paragraphs of the complaint which set forth the overt acts contains a recital.

> "and did then and there manufacture, sell, keep, barter, dealcoholize and otherwise dispose of said beverage."

But a reference to each of said paragraphs shows that the omnibus recital is a mere conclusion of the pleader having no relation to the detailed description of each of the three overt acts of removal.

The "acts of removal" are not forbidden in terms by the injunctional order; hence they were not forbidden at all, unless it can be said, that they are included by reasonable construction in the words "or otherwise dispose of." Five substantial reasons present themselves to establish that they are not so included as follows:

First: By no rule of construction can the word "re-

moved" be said to be synonymous with the words "dispose of." One may remove without disposing of, and conversely, one may dispose of without removing. The words "dispose of" always connote the idea of the transfer of either title or possession by means of gift, sale, exchange, etc. While the word "remove" standing alone involves no idea or notion of transfer. It is said, in 18 C. J. 1281:

> "Even standing alone, the phrase 'dispose of', when used in a criminal statute, is universally held by the courts to include *only* those transactions in which there has been a transfer of either title or absolute possession of the property, or else some disposition of it as would destroy it in whole or in part."

The information for contempt in the instant case did not allege that the barrels of beer were removed by the defendants with the intent of selling or bartering the same and without such allegation, the word "removed" could not be held to be included in the phrase "dispose of." When a person removes goods with the purpose and intent of selling, bartering, exchanging, or in some other way transferring title and possession, the removal may be so closely attached to the disposal as to be an integral part of it, but as said before, there is no such allegation in the information herein filed.

In *Malone* v. *Commonwealth*, 135 S. W. (Ky.) 235, a removal of goods was held to be included in the phrase "dispose of", where such removal was *with intent to sell;* to the same effect also is *State* v. *Gorman*, 216 Pac. (Kan.) 290; but, in *Scott* v. *State*, 64 S. E. (Ga. A) 1005, *a mere removal* was held not to be included within the term "dispose of."

Second: Upon this record the word "removed" is conclusively excluded from the significance of "or otherwise dispose of." The very allegation of each of the

three acts of removal as contained in the information shows that "or otherwise dispose of" means something altogether different from *and additional* to "removal." Thus each of the three paragraphs of the information wherein the specific overt contemptuous acts of "removal" are pleaded concludes generally:

> "And did then and there manufacture, sell, keep, barter, dealcoholize, *and otherwise dispose of* said beverage and did then and there neglect and fail to prevent the *removal* and transportation of said beverage out of and from the said premises."

Third: The word "removal" can not be drawn within the significance of "or otherwise dispose of" because of the elementary rule of *ejusdem generis*. "Or OTHERWISE dispose of," if it means anything must mean an act of character and quality like that of (a) manufacture, (b) sell, (c) keep, (d) barter and (e) dealcoholize. Removal is not such an act.

Fourth: To accord the word "removal", a significance embraced within that of "or otherwise dispose of" would be to vitiate an essential element of restraint in the injunctional order, viz: "keep." As the order recites on its face an inhibition against *keeping*, it would be idle folly to include an inhibition against "removing," for one would destroy the other. Since the injunctional order in terms forbade "keeping" all intendments should be against the inclusion of an act of removal as within the meaning of the words "or otherwise dispose of." The word "remove" is, if anything, the antonym of the word "keep". If the defendants were forbidden to keep, then they were required to move. In this connection let it be noted that it appears from the bill of complaint and particularly the affidavits annexed thereto, that there were on the premises of the defendants, at the time the injunction issued, a quantity of beer in excess of two thousand barrels. The injunctional order forbade

the defendants from keeping it. The information for contempt charged them with the removal of eight hundred barrels of beer.

Fifth: The recital "or otherwise dispose of" is a vague attempt at an omnibus entrapment of a defendant. Fundamentally, as we have already demonstrated, an information for criminal contempt is governed by the rules of criminal pleading. It calls for no argument to prove that an indictment charging the defendant with "otherwise disposing of" property would be a nullity. The specification of the charge must be such that the defendant after paying his debt to the state or to the nation may rely on the accusatory pleading as a receipt, if you please, or as a bar to another prosecution for the same offense. How could any person base a plea of former jeopardy to an indictment for "otherwise disposing of"? Clearly the sixth element of restraint—"or otherwise disposing of"—is too vague and indefinite to include acts of removal or in fact any acts not specifically forbidden.

The first essential of a statute creating a crime is certainty of description of the particular elements of the inhibited act. *Ibi Jus Incertum, Ibi Jus Nullum.* And the degree of certainty, must necessarily be greater than in statutes relating to civil matters; for punitive statutes must be strictly construed and all doubts arising in the process of construction must be resolved in favor of the accused.

A good illustration of a criminal statute held void for uncertainty is presented in *International Harvester Company* v. *Kentucky,* 234 U. S. 216, where the court in declaring a Kentucky punitive antimonopoly statute void for want of certainty, says:

> " * * * if business is to go on, men must unite to do it, and must sell their wares. To compel them to guess on peril of indictment, what the community

would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess."

The jurisdiction of the District Court to proceed under Section 24 was dependent upon the injunctional order and the information for contempt. That jurisdiction was invoked by the government to punish acts of removal in violation of the injunctional order. Section 24, as applied to the instant case, incorporated the restraints of the injunctional order, and the injunctional order does not restrain removal. Therefore, there was nothing before the court and the court had no jurisdiction to enforce the penalty of Section 24.

Point VI.

The common law record in the contempt case shows upon its face that punishment was imposed upon petitioner for three acts of removal not contained or inhibited in the injunctional order. As the judgment is general and contains no findings, there is no way to apportion the sentence as to these three acts, nor to detach the penalty therefor, from that imposed upon petitioner for the six acts restrained by the injunctional order. Wherefore the judgment, sentence and fine are nullities.

The judgment contains no finding as to which of the six acts restrained is the subject of punishment; nor is there any finding as to the extent of punishment for the additional three acts of removal set forth in the information for contempt and not embraced by the terms of the injunctional order. It must, therefore, be conclusively

presumed that the court in fixing the sentence and penalty lumped it for all of the nine acts.

In *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, the court clearly announces the rule to be applied to this sort of situation:

> "The trial judge made no general finding that the defendants were guilty. But in one decree he adjudged that each defendant was respectively guilty of the nine independent acts set out in separate paragraphs of the petition. Having found that each was guilty of these separate acts, he consolidated the sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance. We cannot suppose that he found the defendants guilty of an act charged unless he considered that it amounted to a violation of the injunction. Nor can we suppose that, having found them guilty of these nine specific acts, he did not impose some punishment for each. Instead, therefore, of affirming the judgment if there is one good count, it should be reversed if it should appear that the defendants had been sentenced on any count which, in law or in fact, did not constitute a disobedience of the injunction."

The judgment here is a unit. By the judgment the petitioner was found guilty of all of the following acts:

1. Manufacturing.
2. Selling.
3. Keeping.
4. Bartering.
5. Dealcoholizing.
6. Otherwise disposing of.
7. Act of removal on May 31, 1924.
8. Act of removal on June 2, 1924.
9. Act of removal on June 3, 1924.

Under the *Gompers* case it must be presumed that the general sentence is an aggregate of separate sentences for each of the nine acts listed above.

In the *People* v. *Newmark*, 312 Ill. 625, the court reversed a judgment for criminal contempt where

the petitioner had refused, because of the constitutional privilege, to answer a series of 62 questions propounded to him by the grand jury which was investigating bribery of jurors in the trial of Governor Small. Some of the questions involved answers that would not expose the defendants to danger; but the court considered the judgment of conviction as a unit and refused to apportion or to unscramble the harmful questions from the harmless. To the same effect, see *People* v. *Boyle,* 312 Ill. 586; *Oates* v. *U. S.,* 223 Fed. (C. C. A. 4th Cir.) 1013.

The three acts of removal set forth in the injunction for contempt were wholly foreign to the restraints and inhibitions of the injunctional order. As demonstrated under Point V, the restraints and inhibitions of the injunctional order became, as to this case, part and parcel of the language of Section 24 of Title II of the National Prohibition Act. Thus the three acts of removal, which presumptively were included in the aggregate sentence, were wholly beyond the jurisdiction of the court and could not serve as the basis for punishment.

Point VII.

The judgment of the court finding the defendants guilty of "otherwise disposing of," and the general sentence which impliedly includes a penalty for "otherwise disposing of" are void.

The judgment order of the court found the defendants "guilty of contempt of court of violating the temporary injunction *as charged in said information.*" (Rec., ...) The information charged the defendants with three specific overt acts of removal, and *in addition* thereto, charged that they "did then and there manufacture, sell, keep, barter, dealcoholize, *and otherwise dispose of* said beverage." (Rec., ...) The judgment order of the

court further recites, "It is therefore considered by the court and is the sentence and judgment of the court *upon the finding aforesaid,* that the defendants * * * be confined * * * and forfeit and pay, etc." (Rec., ...)

Thus, it appears, that the court found the defendants guilty of three specific acts of removal and *in addition* thereto, of six other and different acts, one of which was "otherwise disposing of." A general aggregate sentence was imposed for all of the acts of which defendants were found guilty, including "otherwise disposing of."

Under the title "Judgment or Order—Requisites and Validity" it is said in 13 Corpus Juris, page 81, par. 121:

> "It has often been held that, if the facts constituting the contempt are sufficiently set forth in the moving papers filed, the judgment is sufficient if it expresses on its face its general objects together with apt reference to the moving papers."

The judgment order in the instant case made reference to the moving papers, viz: finding the defendants guilty *"as charged in said information."* One of the charges in the information was that the defendants "did then and there * * * otherwise dispose of." In so far as this charge at least is concerned, no facts "constituting the contempt are sufficiently set forth in the moving papers filed"; in truth no facts whatever are set forth. We have already shown under Point V of this argument that the charge "otherwise dispose of" is vague, indefinite, uncertain and wholly insufficient to state an offense or support a judgment. We conclude therefore that the judgment in the instant case, or at least so much of it, as by reference finds the defendants guilty "of otherwise disposing of," is void. Had the sentence imposed been several or definitely apportioned to the several alleged contemptuous acts embraced in the finding of the court, it might be said that the remedy lay in modifying or correcting the judgment or declaring such portion of the